No. 15-5040

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TERRANCE WILLIAMS,

Petitioner,

v.

PENNSYLVANIA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA

REPLY BRIEF

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ARGUMENT

I. Chief Justice Castille's Refusal to Recuse Himself from the Review of the Commonwealth's Appeal Violated Due Process and the Eighth Amendment

When a prosecutor has made an individualized, discretionary decision that the circumstances of a criminal charge and the character of the defendant call for a death sentence, the prosecutor cannot constitutionally preside as a judge on appeal from a ruling that the prosecution engaged in misconduct as a means of securing the death sentence. The Commonwealth cites no case "comparable to the circumstances in this case," *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 887 (2009), and the national consensus in fact mandates recusal in far less glaring circumstances. When "all the circumstances of this case" are weighed objectively, *Id.* at 872, due process requires recusal.

A. Chief Justice Castille Served as Prosecutor and Judge in Petitioner's Case

The Commonwealth characterizes then-District Attorney Castille's decision to seek the death penalty against Mr. Williams as "administrative," Br. for Resp't i, 17, 20, 21, suggesting it was routine or ministerial:[1]

> It was *office policy* that the district attorney *put his signature* on *all such memos*; he

1. *See Black's Law Dictionary* (10th ed. 2014) (defining "administrative" as "[o]f, relating to, or involving the work of managing a company or organization").

> signed scores of them, along with all the other *managerial tasks* of running one of the nation's largest prosecution offices.

Id. at 17 (emphasis added); *see also id.* at 21 ("[T]he memos were passed up the chain of command for the district attorney's signature to indicate official concurrence."); *id.* at 26 ("his signature was an expression of that general policy" in support of capital punishment). The Commonwealth offers no record citations to support its description of the capital charging process in this case.

The Commonwealth's description echoes Chief Justice Castille's opinion declining to recuse himself in *Commonwealth v. Rainey*, 912 A.2d 755 (Pa. 2006). Yet the Commonwealth does not explain the disjuncture between the decisionmaking process reflected in the death authorization memorandum submitted to District Attorney Castille in this case and the purported decisionmaking procedure described in *Rainey* under which his "formal approval . . . simply represented a concurrence in . . . [his subordinates'] judgment that the death penalty statute applied, *i.e.*, that one or more of the statutory aggravating circumstances set forth in the Sentencing Code . . . existed, and nothing more." *Id.* at 758.

The death authorization memorandum belies the assertion that the Chief Justice played no substantial role in this case or that his review was limited to determining whether there was any evidence of a statutory aggravating circumstance. The memorandum shows that, while his subordinates recommended a capital prosecution, District Attorney Castille decided that the crime and Mr. Williams' background warranted a death sentence.

The memorandum provided District Attorney Castille with a wide range of information about the homicide and Mr. Williams' background. It set out detailed features of the homicide that went well beyond Pennsylvania's statutory aggravating circumstances and discussed unrelated robbery charges that would be inadmissible at a capital sentencing. More importantly, the memorandum described potentially mitigating evidence such as his youth, education, and athletic achievements – factors that would all be irrelevant under the procedure described in *Rainey*. The memorandum even referred to witnesses who described Mr. Williams as having "a Jeckyl-Hyde [sic] personality." JA 424a-26a; *see* Br. for Pet'r 4-5. The only plausible reason for including such information in the memorandum was because it was relevant to District Attorney Castille's decision to pursue a death sentence.

The notion that deciding to seek a person's execution is a mere administrative formality is troubling at best. But even assuming that District Attorney Castille's capital charging decision was nothing more than "an expression of . . . general policy" and an "official concurrence," Br. for Resp't 21, 26, this Court has long recognized that an "'official motive'" can be among the "interests that tempt adjudicators to disregard neutrality." *Caperton*, 556 U.S. at 878 (quoting *Tumey v. Ohio*, 273 U.S. 510, 535 (1927)). An adjudicator may have a disqualifying interest "both as an individual and as chief executive," *Tumey*, 273 U.S. at 535, and "executive responsibilities" alone can undermine judicial impartiality, *Ward v. Monroeville*, 409 U.S. 57, 60 (1972). Under Pennsylvania law, District Attorney Castille was responsible for making, and actually made, the life-or-death charging decision in this case. *See* Br. for Pet'r 25 (citing cases). Given the magnitude of this decision,

his "official motive" and "executive responsibilities" as District Attorney disqualified him from participating in the same case as a judge.

The Commonwealth argues that any probability of bias diminished to a constitutionally tolerable level on account of the passage of time. *See* Br. for Resp't 20-26, 29. Recusal obligations, however, have never been understood to have an end date when the judge's conflicting roles arise *in the same case. See Caperton*, 556 U.S. at 880 (discussing *In re Murchison*, 349 U.S. 133 (1955): "This Court set aside the convictions on grounds that the judge had a conflict of interest at the trial stage *because of his earlier participation* followed by his decision to charge them." (emphasis added)); *Murchison*, 349 U.S. at 137 ("Having been a part of th[e accusatory] process a judge cannot be, *in the very nature of things*, wholly disinterested in the conviction or acquittal of those accused." (emphasis added)). At least forty-nine states and the federal government thus establish lifetime bans on a lawyer or judge undertaking conflicting roles in the same case. *See* Model Code of Jud. Conduct Rule 2.11(A)(6); Model Rules of Prof'l Conduct Rule 1.11; Pa. Code of Jud. Conduct Rule 2.11(A)(6); Pa. Rules of Prof'l Conduct Rule 1.11; *see generally* Br. of Amici Curiae Ethics Bureau at Yale 2-4 & n.2. No authority limits to a particular time frame the rule that "no man can be a judge in his own case." *Murchison*, 349 U.S. at 136.

The Commonwealth repeatedly asserts that Chief Justice Castille voted in favor of the October 3, 2012, per curiam order denying the Commonwealth's application to lift the stay of Mr. Williams' execution and thus that he could not have been biased. *See* Br. for Resp't 22-23

n.5, 25, 57, 58, 62. The per curiam order denying the application to lift the stay does not identify the votes of the individual justices. According to the rules of the Pennsylvania Supreme Court, dissenting votes to a per curiam order need not be identified. *See* Pa. Sup. Ct. Internal Operating Procedures § 3.C.4. Thus, the record does not reflect how Chief Justice Castille voted, and no inference of impartiality can be drawn. *See* JA 169a. In any event, just as judicial rulings against a defendant do not suggest bias, *Liteky v. United States*, 510 U.S. 540, 555 (1994), acquiescence in a ruling in a defendant's favor – particularly a ruling that more time is needed to review the case – does not preclude bias.

B. Petitioner Sought Recusal Based on New Evidence of Chief Justice Castille's Role in the Decision to Seek the Death Sentence

The Commonwealth contends that the absence of prior recusal motions demonstrates Petitioner's "own assessment of no probable bias." Br. for Resp't at 36, 37. The Commonwealth further argues that Petitioner's recusal motion here must have been "[t]actical," because, as Petitioner was the prevailing party below, an equally divided Pennsylvania Supreme Court would have affirmed the lower court's grant of relief. *Id.* at 39, 40. The Commonwealth is wrong on each count.

The memorandum demonstrating then-District Attorney Castille's personal, discretionary decision to seek the death penalty against Petitioner was first disclosed in September 2012, just weeks before the recusal motion in this case. Likewise, the extensive evidence suppressed by the Commonwealth was first disclosed in

September 2012, and this evidence formed the basis of the lower court's ruling that Petitioner's death sentence was secured through prosecutorial misconduct and deceit. JA 85a-89a. These dispositive circumstances, upon which Petitioner based his recusal motion, were not present in prior proceedings. *See* Br. for Pet'r 14-17.

Likewise unavailing is the Commonwealth's contention that Petitioner's recusal motion was a tactical effort to obtain an affirmance from an equally divided court. *See* Br. for Resp't 39-40. Although the Pennsylvania Supreme Court is a seven-member court, at the time the recusal motion was filed and at the time the decision was issued in this case, there were only six justices on the court. *See* JA 16a, 36a. Chief Justice Castille's recusal would have eliminated, not invited, the possibility of an equally divided court.

C. This Court's Recusal Decisions Warrant Chief Justice Castille's Disqualification

The Commonwealth posits that this Court's due process cases require recusal in only two categories of cases – where the judge has some financial interest and where "the judge simultaneously acted in two conflicting roles." Br. for Resp't at 41-42. But this Court has rejected such bright-line rules, holding that due process addresses the "interests that tempt adjudicators to disregard neutrality" and recognizing that the "'degree or kind of interest [] sufficient to disqualify a judge from sitting "cannot be defined with precision."'" *Caperton*, 556 U.S. at 878-79 (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986), in turn, quoting *Murchison*, 349 U.S. at 136). Due process is not confined to specific categories;

rather, it requires consideration of "all the circumstances of this case." *Caperton*, 556 U.S at 872.

The Commonwealth also asserts that Chief Justice Castille's refusal to recuse is consistent with the historical practice of several Justices of this Court. Br. for Resp't 42-45. None of the examples it provides involved a Justice who had participated, or had taken an adversarial role, in the same case as the one pending before the Court.

Former Chief Justice Rehnquist's opinion in *Laird v. Tatum*, 409 U.S. 824 (1972), is instructive. After noting that he "did not have even an advisory role in the conduct of the case," then-Justice Rehnquist distinguished *Laird* from those cases where he had recused himself because of even a limited role in the case. *Id.* at 828-29 (citing *United States v. U.S. Dist. Court*, 407 U.S. 297 (1972), where he assisted in drafting a brief, and *S & E Contractors v. United States*, 406 U.S. 1 (1972), where he had an advisory role that terminated prior to the start of litigation).

In a similar vein, Justice Marshall observed in a memorandum to his fellow Justices regarding his recusal practice in NAACP cases:

> For at least a time after leaving the organization, I deemed it proper not to participate in any NAACP matters before the Court, both to quell any appearance of impropriety and to *assure, prophylactically, that I did not decide cases involving issues that were in the office while I was there.*

Justice Thurgood Marshall, Memorandum to the Conference, Oct. 4, 1984, at 1, *in* Papers of Henry A. Blackmun, Library of Congress, Manuscript Division, box 1405, folder 14. Justice Jackson likewise heeded this principle in *Hirota v. General of the Army MacArthur*, 335 U.S. 876 (1948). Although he had recused himself from cases involving war crimes trials in Germany because of his participation in those trials, he did not recuse in cases involving war crimes trials in Japan, where he had not participated. *Id.* at 876-81. Just as Chief Justice Castille's refusal to recuse in this case lies far beyond the bounds of judicial ethics – *see* Br. for Pet'r 32-35; Br. of Amicus Curiae the ABA 7-26; Br. for Amici Curiae Former Judges with Prosecutorial Experience 11-26 – it is likewise foreign to this Court's practices.

II. Due Process and the Eighth Amendment Require Relief from the Decision of a Tribunal that Included a Biased Jurist

The Commonwealth does not argue that public confidence in a judicial decision can be maintained where a biased judge unconstitutionally participated in the decisionmaking; nor does it dispute that the overwhelming majority of state and federal courts find that the presence of a biased judge undermines the tribunal's private, collective deliberative process and thus requires reversal even though the precise effect cannot be ascertained. Instead, the Commonwealth raises three arguments that do not withstand scrutiny.

A. This Case Should Be Remanded for *De Novo* Consideration Without the Participation of Chief Justice Castille

The Commonwealth contends that, in having his reargument application denied below, "Petitioner has already received the relief he now requests." Br. for Resp't 48. The Commonwealth waived this argument by not raising it in its brief in opposition to certiorari. *See* Sup. Ct. R. 15.2; *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 306 (2010).

Even if not deemed waived, the Commonwealth's argument is meritless. Petitioner seeks *de novo* review of his appeal by the Pennsylvania Supreme Court, without Chief Justice Castille's participation.[2] Br. for Pet'r 19, 38, 51. Petitioner's reargument petition, which was filed before Chief Justice Castille's retirement and decided after his retirement, was subject to a far more onerous standard. Pa. R. App. P. 2543 (reargument "is not a matter of right" and will be allowed only on a showing of "compelling reasons"). Moreover, reargument is a discretionary remedy; the *denial* of Petitioner's request for reargument indicated that the court did *not* reconsider the matter on the merits. *Cf.* Pa. R. App. P. 2546(b) (where reargument is *granted* the court may, *inter alia*, "restore the matter to the calendar for reargument" or "specify the issue or issues which will be considered by the court"); *Freed v.*

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2. The equivalent relief followed this Court's decisions in prior due process recusal cases. *See, e.g.*, *Ward*, 409 U.S. at 61-62; *Mayberry v. Pennsylvania*, 400 U.S. 455, 466 (1971); *Nationwide Mut. Ins. Co. v. Clay*, 525 So. 2d 1339, 1340-41 (Ala. 1987) (following remand in *Lavoie*); *Caperton v. A.T. Massey Coal Co., Inc.*, 690 S.E.2d 322, 333-34 (W. Va. 2009) (following remand in *Caperton*).

Geisinger Med. Ctr., 979 A.2d 846, 846 (Pa. 2009) (granting reargument and directing the parties to file supplemental briefs and present oral argument on specified issues). In Pennsylvania as elsewhere, reargument is a disfavored and seldom-granted remedy. The denial of reargument is no substitute for *de novo* review.

The Commonwealth also posits that *de novo* review would be effectively moot because "all Pennsylvania capital sentences have been suspended by a gubernatorial moratorium." Br. for Resp't 52; *see id.* at 54 (citing *Commonwealth v. Terrance Williams*, No. 14 EM 2015, 2015 WL 9284095 (Pa. Dec. 21, 2015)). In that decision, however, the court ruled that because "Williams remains on death row under sentence of death[,] . . . we disagree with the Commonwealth's suggestion that the reprieve unconstitutionally altered a final judgment of this Court; rather, the execution of the judgment is merely delayed." *Williams*, 2015 WL 9284095, at *15. In other words, although executions have been postponed, Mr. Williams' sentence of death remains in force. The Pennsylvania Supreme Court thus continues to adjudicate the validity of capital sentences during the moratorium. *See, e.g.*, *Commonwealth v. Poplawski*, No. 654 CAP, 2015 WL 9485200 (Pa. Dec. 29, 2015). Mr. Williams can obtain *de novo* consideration of this appeal in the Pennsylvania Supreme Court if this Court grants relief.[3]

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3. Petitioner has completed litigation of his federal habeas proceedings; there are no proceedings pending in federal court. The Commonwealth's discussion of two unrelated federal habeas cases held in abeyance, *see* Br. for Resp't 52-54, is therefore irrelevant.

B. Petitioner Sought the Entire Pennsylvania Supreme Court's Review of the Recusal Motion

The Commonwealth next argues that "petitioner was not entitled to disqualify all the remaining justices without first seeking their review of the recusal issue." Br. for Resp't 55. Petitioner, however, does not contend that any Justice other than the Chief Justice should be disqualified, and he was not required by Pennsylvania law or practice to ask the full Pennsylvania Supreme Court to review Chief Justice Castille's denial of the motion to recuse. Nevertheless, he did request such review.

Petitioner has argued that the decision below is not amenable to harmless-error analysis because of the private and collective nature of appellate adjudication and that public confidence in the courts does not extend to tribunal decisions in which a biased judge participated. Br. for Pet'r 35-41. The Commonwealth recasts Petitioner's arguments as a demand "to disqualify all the remaining justices" as biased, and the Commonwealth concludes that Petitioner waived such relief because he did not ask all of the Pennsylvania Supreme Court justices to rule on the recusal motion. Br. for Resp't 55-58. This is a mischaracterization of Petitioner's argument. Petitioner does *not* contend that the other justices are biased, as the Commonwealth elsewhere recognizes. *See* Br. for Resp't 51. Rather, he contends that the participation of a biased jurist requires a *de novo* review of the appeal without the participation of that jurist.

Petitioner was not required to seek the full court's review of the recusal motion, and the Commonwealth cites no authority suggesting otherwise. *See* Br. for Resp't

55-58. The Pennsylvania Supreme Court has rejected procedures that require recusal motions to be considered by judges other than the one whose recusal is sought. *See Reilly by Reilly v. Se. Pa. Transp. Auth.*, 489 A.2d 1291, 1298, 1300 (Pa. 1985) ("[I]t is the duty of the judge to decide whether he feels he can hear and dispose of the case fairly and without prejudice . . . . Once this decision is made, it is final and the cause must proceed."); *see also* 8 *Standard Pennsylvania Practice* § 48:22 (2d ed. 2015) ("The proper practice on a plea of prejudice requesting recusal of a judge is to address an application by petition to the judge before whom the proceedings are being tried.").

Although some Pennsylvania Chief Justices have referred recusal motions to the full court, there is no requirement that such a referral be requested, as under Pennsylvania law a recusal motion to an individual jurist preserves the issue "as any other assignment of error." *Reilly*, 489 A.2d at 1300. Where state law deems the issue preserved, this Court properly addresses it. *Cnty. Court v. Allen*, 442 U.S. 140, 154 (1979).

In any event, in order to provide every opportunity to correct Chief Justice Castille's refusal to recuse, Petitioner did seek full court review of the recusal motion. In the Pennsylvania Supreme Court, "[a]ll motions, petitions and applications will be assigned to the Chief Justice, except for . . . motions addressed to a single Justice." Pa. Sup. Ct. Internal Operating Procedures § 7.B. Before his elevation to Chief Justice, Justice Castille therefore adjudicated individual motions for his recusal, while the Chief Justice handled motions to the full court for Justice Castille's recusal. The Commonwealth recounts two instances where prior Chief Justices referred such motions to the full court. *See* Br. for Resp't 56-57 (citing *Commonwealth v.*

Rollins and *Commonwealth v. Rainey*). After becoming Chief Justice in 2008, however, both individual motions and court motions for Chief Justice Castille's recusal were assigned to him pursuant to § 7.B. In *Commonwealth v. Porter*, for example, Chief Justice Castille denied Porter's request that the recusal motion be referred to the full court, stating: "Even if there were some basis for the request, I would not burden the Court with this sort of pleading." *Commonwealth v. Porter*, 35 A.3d 4, 34 (Pa. 2012) (Castille, C.J., denying motion for recusal). In this case, when Petitioner sought recusal and asked that the full court consider the motion, Chief Justice Castille again refused to refer the motion to the court. JA 171a. Chief Justice Castille – not Petitioner – prevented the full court from considering the recusal motion.

C. The Participation of a Biased Judge on an Appellate Court Requires Relief

The Commonwealth again recasts Petitioner's request for relief as a "'total disqualification' rule" in which "the presence of a non-recused judge has 'infected' all other members of the court." Br. for Resp't 58, 60 (citing Br. for Pet'r 38). According to the Commonwealth, this rule would "sidestep the standard set by the Court in *Caperton*: whether the decision below was the product of 'a constitutionally intolerable probability of [actual] bias.'" Br. for Resp't 58 (quoting *Caperton*, 556 U.S. at 882).

Caperton is fully consistent with the majority rule that an appellate tribunal may not include a biased judge, regardless of whether the judge casts a decisive vote. *Caperton* recognized "[t]he difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one." *Id.* at 883. Those difficulties would only

be compounded by inquiring into the actual influence one justice had on other justices – an inquiry that the Commonwealth's argument necessarily invites. Because, in assessing a judge's *duty* to recuse, "the Due Process Clause has been implemented by objective standards that do not require proof of actual bias," *id.*, it would be incongruous and unworkable to cast aside those objective standards in assessing the *harm* from a failure to recuse.

Finally, the Commonwealth contends that granting *de novo* review would conflict with the practice of some courts, in which, when a judge "recuses only after he has devoted substantial time to the case, . . . the remaining members of the panel proceed to a decision." Br. for Resp't 61. Aside from the obvious distinction that Chief Justice Castille refused to recuse at the outset of this appeal, the decisions cited by the Commonwealth do not indicate whether the recused judges participated in any deliberations or, if so, whether the remaining judges began their deliberations anew after the recusal. *See id.* at 61 n.41 (citing cases).[4]

In fact, the predominant judicial practice – both in this Court and in other courts – is to recommence deliberations anew after a belated recusal. In *Credit Suisse Securities (USA) LLC v. Billing*, 549 U.S. 1277 (2007), for example,

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4. Nor do any of the cited cases involve due process. Rather, the recusals appear to be based on technical statutory requirements that were initially overlooked. *See, e.g., Whitehall Tenants Corp. v. Whitehall Realty Co.*, 136 F.3d 230, 233 (2d Cir. 1998) (cited in Br. for Resp't at 61 n.41) ("[T]he remote circumstance that persuaded Judge Calabresi to recuse himself in an abundance of caution had not occurred to him until after the conclusion of oral argument, and the circumstance involved no interest – pecuniary or otherwise – in the outcome of the litigation.").

Justice Kennedy recused himself after the Court granted certiorari. The Court withdrew its order, reconsidered the petition without Justice Kennedy's participation, and granted certiorari again. The Court followed the same procedure in *Laboratory Corp. of America Holdings v. Metabolite Laboratories, Inc.*, 546 U.S. 999 (2005).[5] Petitioner's request for a remand for *de novo* review is fully consistent with judicial practice in cases where a judge has actually recused herself.

Due process cannot be satisfied by a rule that requires only a majority of appellate judges to be unbiased or that allows all but one member of a court to be free from bias. The essence of due process requires that every member of the court be free from bias.

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5. *See also Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 848 n.* (7th Cir. 2000) ("Circuit Judge Kanne recused himself and did not participate in the consideration or decision of this case, which is being decided by quorum of the panel."); *Schering Corp. v. Pfizer Inc.*, 189 F.3d 218, 221 n.* (2d Cir. 1999) (Sotomayor, J.) ("The third judge on the panel originally designated to hear this matter, the Honorable Fred I. Parker, recused himself from the case after oral argument and did not participate in any aspect of the court's consideration of this matter."); *Tadlock Painting Co. v. Md. Cas. Co.*, 97 F.3d 1449, 1449 n.* (4th Cir. 1996) ("Judge Wilkins heard oral argument in this case but recused himself after certification to the Supreme Court of South Carolina and did not participate in the consideration of this appeal."); *Murray v. Nat'l Broad. Co.*, 35 F.3d 45, 47 (2d Cir. 1994) (stating that the recused judge "has not participated in the adjudication of the appeal"); *State v. Tenay*, 114 A.3d 931, 933 n.** (Conn. 2015) ("Following reargument en banc, Judge Alvord recused herself and did not participate in the consideration or decision of the case.").

CONCLUSION

For the reasons stated above and in Petitioner's Brief, the judgment of the Pennsylvania Supreme Court should be vacated and the case remanded for the Pennsylvania Supreme Court to conduct *de novo* review without the participation of Chief Justice Castille.

Respectfully submitted,

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